IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.08.2007

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

W.P.No.26357 of 2007
M.P.No.1 of 2007

M/s.Larsen and Toubro Ltd.,
ECC Division,
No.10, Club House Road,
Chennai-2. ... Petitioner

Vs.

1. The Assistant Commissioner (CT)
Fast Track II Assessment Circle,
Commercial Tax Building,
Greams Road, Chennai.

2. The Deputy Commissioner (CT),
Central Assessment Circle,
Commercial Tax Building,
Greams Road, Chennai. ... Respondents

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records of the impugned notice in RC 0620015/99/2000 dated 30.07.2007 from the files of the first respondent herein and quash the same.

For Petitioner : Mrs.Aparna Nandakumar

For Respondent : Mr.R.Mahadevan,
Additional Government Pleader

ORDER

Brief facts leading to the Writ Petition are as follows:
The petitioner, is a registered dealer under the TNGST Act, engaged in business of commercial construction and works contract. For the assessment year 1999-2000, they filed their returns quoting the turnover for Rs.289,25,35,384/-. Based on their returns, the Assessing Officer passed an assessment order in TNGST 0620015 dated 30.04.2007, determining the taxable turnover at Rs.2,98,25,55,972/- and disallowed the claim of the petitioners, regarding the inter-State works contract, RMC Freight and pumping charges, sales in the course of import and other issues. He further determined the tax liability at Rs.37,01,68,497/- and levied Rs.6,79,44,165/- as additional tax. Besides, the assessing authority also levied penalty under Section 12(3)(b) of the TNGST Act at

Rs.1,91,03,488 and under the Additional Sales Tax Act, 1970 at Rs.1,16,89,193/-. Out of the above said amounts, the petitioner has already paid tax to an extent of Rs.33,19,61,522/- and additional tax to an extent of Rs.5,23,58,574/- and that the balance of tax and additional tax due to be paid were Rs.3,82,06,975 and Rs.1,55,85,591 respectively.

2. It is the case of the petitioner that they have already paid Rs.3,29,47,570/- towards tax amount and Rs.37,68,265/- towards additional tax amount, in addition to the amounts, shown as paid in the assessment order. Therefore, the petitioner filed rectification petition under Section 55 of the TNGST Act on 16.05.2007 to rectify the error apparent on the face of the record, which had crept in due to non-consideration of the tax and additional tax paid by them. After taking into consideration the tax and additional tax paid by the petitioner, the assessing authority passed the rectification order on 17.05.2007, stating that out of the total tax assessed by the assessing authority at Rs.37,01.68,497/-, the petitioner had already remitted Rs.36,49,09,092/- and that the balance amount of tax due and payable was only Rs.52,59,405/-. The rectification order further reflected that out of the additional tax liability assessed at Rs.6,79,44,165/-, the petitioner had already paid Rs.5,61,26,839/- and therefore, the balance amount of additional tax due and payable by the petitioner was only Rs.1,18,17,326/-. As regards merits of the case, there was no change in the assessment order, except the quantum of amounts mentioned above. Aggrieved by the assessment order dated 13.04.2007, the petitioner filed a statutory appeal before the Appellate Assistant Commissioner (CT)- VI, Chennai, under Section 31 of the TNGST Act, disputing several issues, which includes tax liability of Rs.2,98,72,566/-, levy of additional tax of Rs.1,18,17,326/-, penalty under Section 12(3)(b) of the TNGST Act of Rs.26,29,703/- and penalty under Section 12(3)(b)(ii) of the TNGST Act of Rs.88,62,995/-.

3. Pending appeal, the petitioner filed stay petition in S.P.No.54 of 2007 in under Section 31(5) of the TNGST Act to stay the collection of amounts from them. After hearing both sides, the appellate authority, viz., the Appellate Assistant Commissioner (CT)-VI, Chennai, granted interim stay, which reads as follows:
"The appellants had already paid more than 50% of the disputed tax and Additional Tax vide rectification order dated 17.05.2007. Therefore, the stay is granted for the entire balance of disputed tax of Rs.52,59,405/-, disputed additional tax of Rs.1,18,17,326/- and entire penalty under Section 12(3)(b) of the TNGST Act of Rs.26,29,703/- and penalty under Section 12(3)(b)(ii) of the TNGST Act of Rs.88,62,995.00. The appellants are directed to file Bank Guarantee or valid security for the entire balance tax, Additional Tax and entire penalty amounting totally to Rs.2,85,69,429.00, before the Assessing Officer on or before 09.08.2007."

It is submitted by the petitioner that while they were making arrangements to comply with the condition of furnishing Bank Guarantee, to their shock, the first respondent, viz., the Assistant Commissioner (CT), Fast Track II Assessment Circle, Chennai-6, passed the impugned proceedings dated 30.07.2007, and held that the stay granted in S.P.No.54 of 2007 dated 10.07.2007 by the Appellate Assistant Commissioner (CT)-VI, Chennai as null and void and liable to be set aside. The Assessing Officer has further stated that the TNGST Act contemplates payment of 12.5% disputed tax and 100% payment of admitted tax as pre-requiste condition for entertaining an appeal. For the above said reasons, the Assessing Officer held that the stay order granted by the appellate authority is illegal and directed the petitioner to make entire payment, failing which, appropriate action would be initiated in accordance with law. Being aggrieved by the order of the first respondent dated 30.07.2007, the petitioner has filed the present writ petition seeking for a Writ of Certiorari, to quash the impugned notice in RC 0620015/99/2000 dated 30.07.2007 on the file of the first respondent.

4. Learned counsel for the petitioner submitted that the first respondent, who is the assessing officer has no authority under law to thwart a well-considered stay order passed by the Appellate Assistant Commissioner, CT, VI, Chennai. Relying on the decision in Ragam Polymers v. CTO reported in 8 VST 131, she submitted that the powers of discretion conferred on the Appellate Assistant Commissioner under Section 31(5) of the TNGST Act, cannot be interfered with any manner except by way of further appeal. She further submitted that once the burden of proof on the part of the petitioner as to the payment of taxes had been established beyond doubt before the first appellate authority in the presence of the departmental representative, the first respondent has no authority to over-reach the order of the appellate authority. She further submitted that the order of the first respondent, who is a subordinate officer to the appellate authority in the hierarchical position as per the statute, who has no jurisdiction to declare an order passed by his superior as nullity and on the contrary, it is binding on him.

5. Considering the limited scope of the writ petition, Mr.R.Mahadevan, learned Additional Government Pleader, was put on notice and heard. Referring to Sub-Section 3-A to Section 55 of the TNGST Act, he submitted that the Assessing Authority or an appellate or revising authority (including Appellate Tribunal), may, at any time, within five years from the date of any order passed by it, rectify any error apparent on the face of the record and the powers under Sub-Section (1) of Section 55 of the Act may be exercised by the assessing authorities, even though, the original order of assessment, if any, passed in the matter has been the subject-matter of an appeal or revision.
6. In Union of India v. Kamlakshi Finance Corporation Ltd., reported in 1991 (55) ELT 433 (SC), the Supreme Court has considered the binding nature of the orders of higher Appellate Authorities. In Paragraph 6 and 7 of the judgment, the Supreme Court held as follows:
"The order of the appellate commissioner is binding on the Assistant Collectors working within his jurisdiction and order of the Tribunal is being upon the Assistant Collectors and the Appellate Collectors, who function under the jurisdiction of the Tribunal. The principles of the judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department in itself an objectionable phrase and is the subject-matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. It this healthy rule is not followed, the result will not be undue harassment to assesses and chaos in administration of tax laws."
"7. The impression or anxiety of the Assistant Collector that, if he accepted the assessee's contention, the department would lose revenue and would also have no remedy to have the matter rectified is also incorrect. Section 35E confers adequate powers on the department in this regard. Under sub-section (1), where the Central Board of Excise and Customs (Direct Taxes) come across any order passed by the Collector of Central Excise with the legality or propriety of which it is not satisfied, it an direct the Collector to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order. Under sub-section (2) the Collector of Central Excise, when he comes across any order passed by an authority subordinate to him, if not satisfied with its legality or propriety, may direct such authority to apply to the Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Central Excise in his order and there is a further right of appeal to the department. The position now, therefore, is that, if any order passed by an Assistant Collector or Collector is adverse to the interest of the Revenue, the immediately higher administrative authority has the power to have the matter satisfactorily resolved by taking up the issue to the Appellate Collector or the Appellate Tribunal as the case may be. In the light of these amended provisions, there can be no jurisdiction for any Assistant Collector or Collector refusing to follow the order of the Appellate Collector or the Appellate Tribunal, as the case may be, even where he may have some reservations on its correctness. He has to follow the order of the right appellate authority. This may instantly cause some prejudice to the Revenue but the remedy is also in the

hands of the same officer. He has only to bring the matter to the notice of the Board or the Collector so as to enable appropriate proceedings being taken under S.353(1) or (2) to keep the interests of the department alive. If the officers view is the correct one, it will not doubt be finally upheld and the Revenue will get the duty, though after some delay which such procedure would entail."

7. The Supreme in Triupati Balaji Developers (P) Ltd., v. State of Bihar reported in 2004 AIR SCW 2522, considered the jurisdiction of the appellate authority. In Paragraph 11, the Supreme Court held as follows:
"11. The very conferral of appellate jurisdiction carries with it certain consequences, Conferral of a principal substantive jurisdiction carries with it, as a necessary concomitant of that power, the power to exercise such other incidental and ancillary powers without which the conferral of the principal power shall be rendered redundant. As held by their Lordships of the Privy Council in Nagendra Nath Dey v. Suresh Chandra Dey and Ors. AIR 1939 Privy Council 165 (Sir Dinshah Mull a speaking for the Bench of five), an appeal is an application by a party to an appellate Court asking it to set aside or reverse a decision of a subordinate Court. The appeal does not cease to be an appeal though irregular or incompetent. Placing on record his opinion, Subramania Ayyar, J. as a member of the Full Bench (of five judges) in Chappan v. Moidin Kutti (1899) 22 ILR Mad 68 (at p.80) stated inter alia that appeal is "the removal of a cause or a suit from an inferior to a superior judge or court for re-examination of review". According to Wharton's Law Lexicon such removal of a cause or suit is for the purpose of testing the soundness of the decision of the inferior court, in consonance with this particular meaning of appeal, "appellate jurisdiction" means "the power of a superior court to review the decision of an inferior court." "Here the two things which are required to constitute appellate jurisdiction, are the existence of the relation of superior and inferior court and the power on the part of the former to review decision of the latter. This has been well put by story: "The essential criterion of "appellate jurisdiction" is, that it revises and corrects the proceedings in a cause already instituted and does not create that cause. In reference to judicial tribunals an appellate jurisdiction, therefore, necessary implies that the subject-matter has been already instituted and acted upon, by some other court, whose judgment or proceedings are to be reversed," (Section 1761, Commentaries on the Constitution of the United States)...."

8. Following the above judgments, this Court in Tvl.Ragam Polymers v. Commercial Tax Officer reported in 8 VST 131, in Paragraph 17, held as follows:
"17. The action of the assessing officer in passing the impugned assessment order, which has been passed without any regard to the direction given by the Appellate Assistant Commissioner, having regard to the statutory hierarchial scheme and the binding nature of the order passed by the appellate authority as envisaged in the various decisions above referred to, cannot be legally sustainable and it has to be set aside with a specific direction to the assessing officer to follow the directions given by the Appellate Assistant Commissioner in his proceedings dated 17.07.2001. In the given sets of facts, I can also take support of the ratio laid down in the case of Union of India v. Kamlakshi Finance Corporation Ltd., reported in 1991 (55) ELT 433 (SC), to state that it is not as if the revenue is left without any remedy. Even assuming for a moment the order of the Appellate Authority is not in accordance with law, the revenue can very well take the order on appeal and there are provisions as stated in the earlier paragraphs in which the superior officers are vested with the suo motu powers to call for, rectify the defects, if any, in the orders passed under the provisions of the Act. Of course, as stated by the Supreme Court, in the above said process, there will be some delay in conclusion of the proceedings, for that matter, the assessing officer cannot ignore the directions given by the appellate authority."

9. Section 31(3) of the TNGST Act empowers the Appellate Assistant Commissioner, after giving the appellant a reasonable opportunity of being heard, and for the sufficient reasons to be recorded in writing, confirm, reduce, enhance or annul the assessment or penalty or both or set aside the

assessment and direct the assessing authority to make a fresh assessment after such further inquiry as may directed or in the case of any other order, confirm, cancel or vary such order. The proviso to said Section envisages that at the time of hearing of any appeal, the appropriate authority shall have the right to be heard either in person or by a representative. The First Appellate Authority is having wide powers to revise or re-write the order of assessment. Once the Appellate Authority gives direction to the Assessing Officer, he is bound to follow the same, as the Appellate Assistant Commissioner is placed vertically over the Assessing Officer under the hierarchical system in the Taxing Statute.

10. From the above judgments, it is clear the Assessing Authority is bound by the orders of the Appellate Authority. The order of the first respondent, viz., The Assistant Commissioner (CT) Fast Track II Assessment Circle, dated 30.07.2007, setting aside the stay granted by the First Appellate Authority and declaring the same as illegal is nothing but an arbitrary exercise of power, excess of jurisdiction and it is not sustainable in law. If the Assessing Authority had any doubts regarding the determination of tax liability and payment of disputed tax, he can always bring it to the notice of the departmental representative to represent on his behalf before the appellate authority and he cannot straight away set aside the order of the First Appellate Authority. The impugned order of the Assessing Authority is nothing but a transgression on the powers of the Appellate Authority and it is liable to be set aside and accordingly, it is set aside.

11. In view of the above, the Writ Petition is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

07.08.2007
skm
To
1. The Assistant Commissioner (CT)
Fast Track II Assessment Circle,
Commercial Tax Building,
Greams Road, Chennai.

2. The Deputy Commissioner (CT),
Central Assessment Circle,
Commercial Tax Building,
Greams Road, Chennai.

S. MANIKUMAR, J.

skm

W.P.No.26357 of 2007

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S. MANIKUMAR,J.,

This matter has been taken up today under the caption for "Being Mentioned".

2. Learned counsel for the petitioner submitted that there is a typographical error in the order dated 07.08.2007 that there is Paragraph 17 in the judgment reported in "8 VST 131.

3. I have gone through the judgment. Instead of typing the number of the Writ Petition as W.P.No.36581 of 2005, dated 22.02.2007, it has been wrongly typed as "8 VST 131".

4. Hence Registry is directed to correct the mistake and re-issue the corrected order.

10-12-2007
skm

Note: Registry is directed to
issue amended order copy
by 11.12.2007
S. MANIKUMAR,J.,
skm

W.P.No.26357 of 2007d

10.12.2007